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IN THE

Supreme Court of the United States

TERM, 1968

No. [redacted] 166

UNITED STATES OF AMERICA,
Respondent,

—v.—

JOSEPH RINALDI,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HENRY B. ROTHBLATT,
Counsel for Petitioner.
507 East 161st Street,
Bronx, New York 10451

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals in the Second Circuit rendered in the above-entitled case on May 7th, 1968.

Citations to Opinions Below

The petitioner was convicted, upon the verdict of a jury, before the Hon. Irving Ben Cooper, a Judge of the United States District Court for the Southern District of New York, of violating Section 1001, Title 18 of the United States Code. Judgment was entered on June 22nd, 1967. The opinion of the Circuit Court of Appeals, printed in Appendix A hereto. The opinion of the Circuit Court of Appeals, denying petitioner's motion for a rehearing, printed in Appendix B hereto.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on or about April 19, 1968. Rehearing was denied on May 7th, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Questions Presented

1) Must the element of materiality be read into all the provisions of Title 18, Section 1001 of the United States Code?

2) Was it error for the trial court to admit out of court statements of a third party as admissions against the defendant?

Statement

The petitioner was indicted for violating Title 18, Section 1001, of the United States Code, in that he made, or caused to be made, certain statements to the Immigration and Naturalization Service which he knew to be false in order to procure the immigration of one Giovanni Caccavale to the United States.

The statements which were claimed to be false were said to be contained in a petition for a first preference visa and in the incorrect translation of some Italian records and documents.

The petitioner was placed on trial before Judge Irving Ben Cooper and a jury in the United States District Court for the Southern District of New York. The petitioner was found guilty of violating Title 18 U.S.C. Section 1001. He was sentenced to imprisonment for one year on six of the seven counts in the indictment, sentences to run concurrently.

The Court below affirmed the judgment of conviction of the District Court upon the authority of *United States* v. *Marchisio,* 344 F.2d 653 (2d Cir.) 1965 and *United States* v. *Silver,* 235 F.2d 375 (2d Cir.), *cert. denied,* 352 U.S. 880 (1956).

Reasons for Granting the Writ

1. The decisions of the Court below in the instant case and in *United States* v. *Marchisio,* 344 F.2d 652 (2d Cir.) 1965 and *United States* v. *Silver,* 235 F.2d 375 (2d Cir.), *cert. denied,* 352 U.S. 880 (1956) upon the authority of which the instant case was decided, are in conflict with the decisions of the Courts of Appeals for the Fourth, Fifth, Ninth, Tenth and D.C. Circuits.

These Courts of Appeals in *United States* v. *Zambito,* 315 F.2d 266 (4th Cir.), *cert. denied,* 373 U.S. 924 (1963); *Rolland* v. *United States,* 201 F.2d 678 (5th Cir.), *cert. denied,* 345 U.S. 964 (1963); *Pariten Singh Poohian* v. *United States,* 294 F.2d 74 (9th Cir. 1961); *Brandon* v. *United States,* 268 F.2d 559, (9th Cir. 1959); *Gonzales* v. *United States,* 286 F.2d 118 (10th Cir. 1960); and *Friedus* v. *United States,* 223 F.2d 598 (D.C. Cir. 1955) have held that materiality in an essential element in a prosecution for violation of Title 18 U.S.C. Section 1001.

2. Clearly, the question presented is of importance in prosecutions under Title 18 U.S.C. Section 1001. As Section 1001 is, by its terms, a general statute relating to falsifications in documents submitted to *any* department or agency of the government, the reach of this section is quite broad.

The issue, therefore, of whether "materiality" is an element of violation of Title 18 U.S.C. Section 1001 is far-reaching. It can effect prosecutions ranging, in area, from income-tax returns to Selective Service registration to immigration.

As this issue is so far-reaching, a decision from this Court is needed to clarify the area. It is manifestly improper that the issue of materiality be an essential element of a proof in one Circuit and not in another.

Settlement of the question by this Court is plainly in the public interest, since it is likely to be present in almost every prosecution under Title 18 U.S.C. Section 1001, including many now pending.

3. This Court should grant the writ its general supervisory powers in cases arising in the Federal Courts.

During the trial of this action statements made by one Thomas Lentini were elicited as admissions against the defendant. The defendant was not charged with conspiracy or aiding and abetting the violation of the United States Code.

The admission of statements made by a third party as admissions binding upon the defendant was manifestly improper and amounted to a denial of due process.

The admission of such statements in a Federal criminal prosecution was such error as to warrant this Court's exercise of its general supervisory powers.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HENRY B. ROTHBLATT,
Counsel for Petitioner.
507 East 161st Street,
Bronx, New York 10451

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 295—September Term, 1967.

(Argued January 23, 1968 Decided April 19, 1968.)

Docket No. 31812

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH RINALDI,

Defendant-Appellant.

Before:

MEDINA, MOORE and ANDERSON,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge*.

Joseph Rinaldi appeals from a judgment of conviction for making false statements to the Immigration and Naturalization Service, in violation of 18 U. S. C., Sections 1001, 1002. Affirmed.

TERRY F. LENZNER, Assistant United States Attorney, New York, N. Y. (Robert G. Morvillo, Assistant United States Attorney and Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, N. Y., on the brief), *for appellee.*

EMMA ALDEN ROTHBLATT, Bronx, New York (Henry B. Rothblatt, Bronx, New York, on the brief), *for defendant-appellant.*

MEDINA, *Circuit Judge*:

In connection with an attempt to procure a first preference visa for an Italian immigrant named Giovanni Caccavale, Joseph Rinaldi, a New York Notary Public, entered upon a course of conduct that led to his indictment for making false statements to the Immigration and Naturalization Service, in violation of 18 U. S. C., Sections 1001, 1002. He now appeals from a judgment of conviction on six of the seven counts contained in the indictment, having been sentenced to imprisonment for one year on each of the six counts, to run concurrently. He is at present enlarged on $5000 bail. Appellant seeks a reversal of the judgment because of allegedly erroneous rulings on the admissibility of evidence, because certain questions and comments of the trial judge are said to have deprived him of a fair trial, and because of the denial of his motion to dismiss count 2 for failure of the Government to establish that the false statement therein alleged was "material." We find no merit in any of these contentions and affirm the judgment of conviction.

On the basis of the testimonial and documentary proofs and inferences fairly to be drawn therefrom the jury would have been justified in finding the following scheme to have been concocted and carried out by Rinaldi, acting at least to some extent with a lawyer named Thomas P. Lentini, with whom Rinaldi had a somewhat dubious connection. Having ascertained that Caccavale wished to come with his family to the United States, Rinaldi decided that the way to accomplish this purpose was to represent Caccavale as a man with special skills in short supply in the United States and thus procure for him a first preference visa. The first step was to obtain certificates from the employer of Caccavale in Italy and a statement of his war record. When these documents, all written in the Italian language, arrived, Rinaldi, one of whose principal occupations was that of translating and interpreting from Italian into English, should have immediately known that it was highly improbable that Caccavale would qualify for a first preference visa. Despite this Rinaldi proceeded to find a "sponsor," that is to say someone who would agree to employ Caccavale to do the type of work required to qualify him for the visa. On the recommendation of a friend Rinaldi approached Nicholas DeGruccio, who owned an automobile machine shop in Maspeth, Long Island, New York. DeGruccio said he could use a mechanic's helper, but all he could afford to pay was $50 a week. Rinaldi promptly agreed to make up any difference in salary out of his own pocket.

Without the knowledge of DeGruccio appellant proceeded to have stationery printed, under the description of "Nick's Auto Machine Shop, 61-01 Eliot Avenue, Maspeth, N. Y.," for the purpose of applying in the regular way to the New York State Department of Labor for a clearance order. With the stationery in hand Rinaldi

then composed a letter stating that Caccavale: "Will be required to setup and operate electric engine lathe, boring bar, drum cutter, and drill press. Able to use micrometer to tolerance of .002 of an inch." This was made up out of whole cloth, according to DeGruccio as he had no electric engine lathe or drill press, but Rinaldi signed DeGruccio's name to the letter, without DeGruccio's knowledge or consent. The letter was sent and the clearance order arrived in due course. The specified salary was, of course, for more than DeGruccio had told Rinaldi he could pay.

With the clearance order in hand, Rinaldi then filled out the prescribed form of petition to be filed with the Immigration and Naturalization Service, containing answers to the questions printed in the form. With this petition Rinaldi filed the documents in Italian, to which we have already referred, together with what purported to be correct and true translations in English. DeGruccio did not see this petition. As in the case of the letter to the New York State Department of Labor, Rinaldi signed DeGruccio's name, again without his knowledge or consent. In addition, Rinaldi, as Notary Public, signed the statement, below what purported to be the signature of DeGruccio, stating falsely that DeGruccio "had subscribed and sworn to" the petition before him on February 4, 1964. To make the misrepresentation complete Rinaldi signed the name of Thomas P. Lentini, the lawyer, to a statement that was part of the required form of petition, to the effect that Lentini had prepared the petition "at the request of the petitioner," although Rinaldi knew that he and not Lentini had prepared the petition and that DeGruccio not only had not requested the preparation of the petition but in fact knew nothing about it. While the notice of appearance was also written out by Rinaldi and he signed Lentini's name to it, there is some question as

to whether or not Lentini authorized this, perhaps on a *nunc pro tunc* basis.

So the day of the hearing arrived. Rinaldi and Lentini picked up DeGruccio at his shop and the three drove together to the office of the Immigration and Naturalization Service in Manhattan. We need not pause to recount DeGruccio's version of the conversation in the car and in the anteroom. The general effect is that he was told to give false answers to various questions the hearing examiner might be expected to ask. DeGruccio and Lentini then went into the hearing room, leaving Rinaldi in the anteroom.

It was soon apparent to the hearing examiner that something was wrong. The lawyer Lentini insisted on answering the questions and it was not long before the hearing examiner took a look at the translation Rinaldi had prepared of the employer's certificate concerning the work Caccavale had done for him in Italy. The key words in the certificate are: "ed é attualmente addetto alle seghe per segare i marmi." This Rinaldi had translated as "very adept in the making of parts and tools." What attracted the attention of the hearing examiner was the word "marmi," meaning marble. There was nothing about marble in the translation. So, one thing led to another, and it became apparent that the whole thing was a hoax. The true and correct translation is that Caccavale "is at present occupied with saws and sawing marble," very different from "very adept in the making of parts and tools." Perhaps the similarity of the Italian words "addetto" and "adetto" or "adepto" suggested to Rinaldi the making of the false and misleading translation. Indeed, there is no reference whatever in any part of the Italian certificate to the making of any parts and tools. The result was that the petition was immediately withdrawn and this prosecution followed.

Against this factual background the law points may be disposed of in a few words. The testimony concerning what was said in the hearing room in the absence of Rinaldi was properly received as Lentini and Rinaldi were engaged in an illegal joint enterprise, which makes statements by any member of the venture admissible against the others and each of them, whether or not a conspiracy is charged. See *United States* v. *Messina,* 388 F.2d 393 (2d Cir. 1968); *United States* v. *Jones,* 374 F.2d 414 (2d Cir. 1967); *United States* v. *Annunziato,* 293 F.2d 373 (2d Cir.), *cert. denied,* 368 U.S. 919 (1961). The trial was conducted with scrupulous fairness to the prosecution and the defense alike. We find absolutely nothing in the comments or questions of Judge Cooper to warrant the charge that he was "an overt ally" of the Government. The contention that he was prejudiced is wholly without foundation and frivolous.

As to the question of materiality, Section 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

We recognize that other circuits have held that materiality must be read into all the provisions of Section 1001.[1] How-

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[1] *United States* v. *Zambito,* 315 F.2d 266 (4th Cir.), *cert. denied* 373 U.S. 924 (1963); *Paritem Singh Poonian* v. *United States,* 294 F.2d 74 (9th Cir. 1961); *Gonzales* v. *United States,* 286 F.2d 118 (10th Cir. 1960), *cert. denied* 365 U.S. 878 (1961); *Freidus* v. *United States,* 223 F.2d 598 (D.C. Cir. 1955); *Rolland* v. *United States,* 200 F.2d 678 (5th Cir.), *cert. denied* 345 U.S. 964 (1953).

ever, the statute is clearly written in the disjunctive and we have held that the prosecution is not obliged to prove the materiality of "false statements" alleged to have been made in violation of that section. See *United States* v. *Marchisio*, 344 F.2d 653 (2d Cir. 1965); *United States* v. *Silver*, 235 F.2d 375 (2d Cir.), *cert. denied*, 352 U.S. 880 (1956). Moreover, we think the false statement cited in count 2—the average number of employees in Nick's Auto Shop—was material to the issue of whether a first preference visa should be made available to one whose skill is in short supply in this country.

Affirmed.

Appendix B

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

31812

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

JOSEPH RINALDI,
Defendant-Appellant.

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

It is further ordered that the motion to stay the issuance of the mandate pending a petition for a writ of certiorari to the Supreme Court of the United States is hereby granted subject to the provisions of Rule 28(c).

s/ HAROLD MEDINA
HAROLD MEDINA

s/ LEONARD P. MOORE
LEONARD P. MOORE

s/ ROBERT ANDERSON
ROBERT ANDERSON
Circuit Judges

May 7th, 1968

SUPREME COURT, U. S.

No. 165

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In the Supreme Court of the United States

OCTOBER TERM, 1965

JOSEPH RINALDI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
ROBERT G. MAYHACK,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 166

JOSEPH RINALDI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a; R. 543-549) is reported at 393 F.2d 97.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1968 (R. 550). A petition for rehearing was denied on May 7, 1968. The petition for a writ of certiorari was filed on June 6, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government adequately proved violation of 18 U.S.C. 1001 (false statement to a government agency).

2. Whether statements by a co-adventurer in furtherance of an illegal joint enterprise were admissible in evidence against petitioner.

STATEMENT

In a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on six counts of a seven-count indictment charging the making of false statements in violation of 18 U.S.C. 1001, in a matter within the jurisdiction of the Immigration and Naturalization Service (R. 462-463, 469-471). On July 27, 1967, he was given concurrent sentences of imprisonment for one year (R. 476). On appeal, the conviction was affirmed (R. 550).

The evidence showed that in December 1962, petitioner agreed to assist an Italian immigrant named Caccavale to immigrate to the United States (R. 330-333). One DeGruccio, the operator of an automobile garage in New York, agreed to hire Caccavale for $50 per week with petitioner paying any additional salary required (R. 7-8). On stationery bearing a letterhead for DeGruccio's garage which petitioner ordered, petitioner sought a labor clearance on the ground that DeGruccio needed to employ a machinist with specified skills. Petitioner received a clearance order, certifying that the available American labor market could

not fill the position involved because of the special skills required (R. 52-53, 170-171, 179, 352, 344).

After obtaining the clearance order petitioner, without informing DeGruccio, prepared and submitted to the Immigration and Naturalization Service, a petition, dated February 4, 1964, purportedly signed by DeGruccio, seeking a first preference for Caccavale (Gov. Ex. 3; R. 46-47). Petitioner had forged the signature of DeGruccio to this petition (R. 46-47, 349-350). DeGruccio testified that the petition contained a number of false statements: *e.g.*, that his business had annual gross sales of from $40,000 to $50,000; that he had an average number of three employees; and that the alien's salary would be $140 per week (R. 48-49). One Italian document accompanying the petition, according to petitioner's translation, stated that Caccavale was "very adept in the making of parts and tools"; the correct translation was that Caccavale "is actually assigned to the saws for the sawing of marble" (R. 183-186). Petitioner's translation of Caccavale's Italian military record indicated that Caccavale had been an electric lathe operator and had serviced certain machines; the correct translation referred to no such duties (R. 190-193).

On May 14, 1964, the scheduled date for a hearing on the visa petition, petitioner went to DeGruccio's repair shop with an attorney named Lentini, in whose office petitioner worked (R. 10-11, 234-235, 251). During the drive to the Immigration Service offices, and again after arrival there, Lentini, in petitioner's presence, instructed DeGruccio to give answers which would conform to the information furnished by peti-

tioner on the visa petition. Lentini told DeGruccio what questions would be asked and what answers he should give (R. 20-27). Lentini and DeGruccio (not in the presence of petitioner) were then called into the hearing (R. 32). DeGruccio testified that an Immigration officer asked him a number of questions, to which Lentini gave false answers, *e.g.*, that DeGruccio's gross annual sales were from $40,000 to $50,000, that he had three employees, and that he had advertised for a machinist (R. 32-34). In the course of the hearing, after the officer indicated dissatisfaction, DeGruccio, at the suggestion of the officer and Lentini, withdrew his petition (R. 37, 39, 248-249). The present prosecution against petitioner followed.

ARGUMENT

1. Count 2 of the indictment charged that the visa petition was false in stating that Nick's Auto Shop employed three persons. Count 3, on which petitioner was acquitted, charged that the visa petition had falsely stated the address of Nick's Shop. At the close of the government's case, petitioner moved for judgment of acquittal on these two counts on the ground that the false statements were not material (R. 212-214). No claim was made that the falsity alleged in the other counts was not material.* Both the district court and the court of appeals noted the prior

* Count 1 was based on the false signature on the visa petition; Counts 4 and 5 on false statements in the application for labor clearance; and Counts 6 and 7 on falsities in the translations of the Italian documents (R. 469-471).

holdings of the Second Circuit that, under the false statement clause of 18 U.S.C. 1001, the prosecution is not required to prove materiality. *United States* v. *Silver*, 235 F.2d 375, 377 (C.A. 2), certiorari denied, 352 U.S. 880; *United States* v. *Marchisio*, 344 F.2d 653, 666 (C.A. 2); *United States* v. *McCue*, 301 F.2d 452, 456 (C.A. 2), certiorari denied, 370 U.S. 939. The court of appeals also ruled that, in any event, the false statement charged in Count 2 was material.

In view of the fact that petitioner received concurrent sentences on all counts—including those based on false statements whose materiality is unchallenged—the issue as to whether materiality must be shown is not presented by this case. Moreover, as the court below held, even as to Count 2 alone, the false statement as to the average number of employees in Nick's Auto Shop was "material" to the issue of whether a first preference visa should have been available to one whose skill was in short supply in the United States (Pet. 7a). Even in circuits which have held that materiality must be shown, the question is one for the court. *Gonzales* v. *United States*, 286 F.2d 118 (C.A. 10), certiorari denied, 365 U.S. 878; *Weinstock* v. *United States*, 231 F.2d 699 (C.A.D.C.). Since in this case the materiality of the statements is evident, there would be no occasion to reach the conflict among the circuits as to whether materiality must be proved.

2. DeGruccio's testimony regarding statements made by Lentini at the Immigration Service hearing was not inadmissible hearsay, as petitioner contends. The evidence at the trial showed that petitioner and Lentini entered into an illegal joint venture to de-

fraud the Immigration Service. During the drive to the hearing Lentini, in the presence of petitioner, coached DeGruccio to give false answers at the hearing consistent with the false answers petitioner had written in the petition. Since this evidence established that Lentini was working with petitioner as a joint venturer, Lentini's false statements in furtherance of the scheme were properly admitted in evidence against petitioner, even though no conspiracy was charged. *United States* v. *Annunziato*, 293 F.2d 373 (C.A. 2), certiorari denied, 368 U.S. 919; *United States* v. *Marchisio*, 344 F.2d 653, 668 (C.A. 2); *United States* v. *Messina*, 388 F.2d 393, 394 (C.A. 2).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

JULY 1968.

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